Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2002

ALAN ROSS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure to instruct the jury that, in order to convict the defendant of an offense under 21 U.S.C. §848, it must reach a unanimous, beyond a reasonable doubt, verdict as to each of the three violations which it finds to comprise the continuing series of violations with respect to which the defendant occupied an organizer, supervisor or management position and from which he derived substantial income or resources, as required by *Richardson v. United States*, 526 U.S. 813 (1999), so substantially undermines the jury trial right guaranteed to federal criminal defendants by the Sixth Amendment to the United States Constitution that it should be regarded as structural error not subject to review for harmless error.

2. If such error is subject to harmless error review, whether, where the constitutional error has not previously been reviewed under the harmless beyond a reasonable doubt standard of *Chapman v. California*, 386 U.S. 18 (1967), a federal court on collateral review of a federal conviction under 28 U.S.C. §2255 should apply the *Chapman* standard or instead the substantial and injurious influence standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

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The opinion of the Eleventh Circuit Court of Appeals is reported at 289 F.3d 677 (11th Cir. 2002).

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit was entered on April 19, 2002. Ross' timely petition for rehearing and petition for rehearing *en banc* was denied on August 9, 2002. This Court has jurisdiction to review the judgment of the Eleventh Circuit on a writ of certiorari under 28 U.S.C. §1254(1).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. §848 provides, in pertinent part:

> **Penalties; forfeitures**
> (a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the

greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title . . . .

* * * *

(c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter –

(A) which are undertaken by such person in concert with five or more persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

STATEMENT OF THE CASE

Ross was charged in a three count indictment with engaging in a continuing criminal enterprise in violation of 21 U.S.C. §848 ("CCE"), as well as conspiracy to possess cocaine and marijuana and conspiracy to import cocaine and marijuana. The §848 count set forth only the bare-bones language of the statute and did not specify the three or more violations which were alleged to constitute the requisite continuing series of violations. At trial, the district court refused Ross' request that the jury be instructed that it was required to agree unanimously upon the three or more violations it found to constitute the §848 continuing series of violations. Instead, the jury was instructed:

A "continuing series of violations" means proof of at least three violations of the federal controlled substances law, and also requires a finding that those violations were connected together as a series of related or ongoing activities, as distinguished from isolated or disconnected acts. It is not necessary that an offense be charged in order for it to constitute part of a continuing series of violations.

The jury returned verdicts of guilty on all counts, and Ross was sentenced to three concurrent terms of life imprisonment, which he is currently serving. On appeal, the Eleventh Circuit Court of Appeals rejected Ross' argument that the district court erred in refusing to give a specific unanimity instruction regarding the §848 series violations. *United States v. Ross*, 33 F.3d 1507, 1525 n.32 (11th Cir. 1994), *cert. denied*, 515 U.S. 1132 (1995).

On June 1, 1999, this Court decided *Richardson v. United States*, 526 U.S. 813 (1999), in which it held that the individual violations which were alleged to comprise the §848 continuing series of violations were elements of the §848 offense, each of which the jury was required to find unanimously and beyond a reasonable doubt. Ross moved to amend his then-pending 28 U.S.C. §2255 motion to add a claim based on *Richardson*. After receiving submissions from both parties, the Magistrate Judge recommended that leave to amend be granted and that additional briefing directed to the issue whether the *Richardson* issue was harmless be ordered. Although it was quite plain that the Magistrate Judge considered the appropriate frame of reference for the harmlessness inquiry to be the harmless beyond a reasonable doubt standard of *Neder v. United States*, 527 U.S. 1 (1999), and *Chapman v. California*, 386 U.S. 18 (1967), the government filed no objections to the Report and Recommendation. In supplemental briefing filed after the district court adopted the Magistrate Judge's recommendation, the government expressly argued that the *Neder/Chapman* standard

should be applied. In his second Report and Recommendation, the Magistrate Judge again addressed the issue under the *Neder/Chapman* harmless beyond a reasonable doubt standard, and the government again did not object to the Magistrate Judge's formulation of the harmless error inquiry. The district court ruled, consistently with every circuit which has considered the issue, that *Richardson* was retroactive to cases on collateral review[1] and that the failure in this case to instruct the jury that it was required to agree unanimously and beyond a reasonable doubt regarding the three or more violations which it found to constitute the continuing series of violations was constitutional error under *Richardson*. The district court concurred that *Neder/Chapman* provided the correct analytical framework and that the burden was on the government to demonstrate harmlessness beyond a reasonable doubt, but ultimately concluded that the error was harmless.

On appeal, the Eleventh Circuit agreed that *Richardson* was retroactive to cases on collateral review,[2] such as this one, and that constitutional error had occurred here. The Court concluded that the error was not a structural one, but instead was subject to harmless error review. As to the harmless error standard to be applied, the government suggested for the first time on appeal that "there is an argument to be made" that the district court should have applied the "substantial and injurious effect or influence" standard of *Brecht v. Abrahamson*, 507 U.S.

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1 *See Santana-Madera v. United States*, 260 F.3d 133 (2d Cir. 2001), *cert. denied*, 122 S.Ct. 817 (2002); *United States v. Lopez*, 248 F.3d 427, 432 (5th Cir.), *cert. denied*, 122 S.Ct. 222 (2001); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir.), *cert. denied*, 531 U.S. 930 (2000); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000).

2 The government filed a petition for rehearing directed to the retroactivity issue, which was denied by the Court. See App. 13.

619 (1993), rather than the *Neder/Chapman* harmless beyond a reasonable doubt standard. The Eleventh Circuit, despite the government's waiver of the issue, proceeded to address the issue of whether *Brecht* or *Chapman* provided the appropriate harmless error standard and concluded that, because this case was a collateral attack on Ross' conviction, the *Brecht* standard should be applied, notwithstanding the fact that Ross' *Richardson* claim had not been afforded *Chapman* review on direct appeal. *Ross v. United States*, 289 F.3d 677, 682 (11th Cir. 2002).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE FAILURE TO INSTRUCT THE JURY THAT IT MAY NOT CONVICT A CRIMINAL DEFENDANT OF VIOLATING 21 U.S.C. §848 UNLESS IT REACHES A UNANIMOUS, BEYOND A REASONABLE DOUBT, VERDICT AS TO THE THREE OR MORE VIOLATIONS WHICH COMPRISE THE CONTINUING SERIES OF VIOLATIONS SHOULD BE REGARDED AS STRUCTURAL ERROR.

This case starkly presents the question raised by Justice Scalia in his separate opinion in *Neder v. United States*, 527 U.S. 1 (1999) – how many essential elements of the offense must be missing from the jury's verdict before it becomes impermissible for appellate courts, through application of harmless error analysis, to substitute their conclusions regarding the defendant's guilt for those which should have been made by the jury but were not? The absence of the unanimity instruction required by *Richardson v. United States*, 526 U.S. 813, 817 (1999), informing the jury that it must be unanimous as to the three or more violations which comprise the continuing series of violations permits the return of a less than unanimous verdict as

to as many as six elements of the offense: the three or more violations which are sufficiently related to comprise a continuing series of violations, and the other elements which can only be determined in relation to the specifically identified series of violations, *i.e.*, the five or more persons element, the role element, and the substantial income or resources element. To uphold a §848 conviction under such circumstances would do such substantial violence to the jury trial right guaranteed by the Sixth Amendment that the error in this case, and others like it, should be regarded as structural error.

In construing the elements of 21 U.S.C. §848 in *Richardson*, this Court recognized that "[c]alling a particular kind of fact an 'element' carries certain legal consequences." 526 U.S. at 817. One of those consequences "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the government has proved each element." *Id.* Thus, in the wake of *Richardson*, a jury may not convict a defendant of a §848 offense unless it agrees, unanimously and beyond a reasonable doubt that the defendant committed the *same* three or more violations. Under the instructions as given in this case, the jurors only had to ask themselves whether Ross had committed three or more related drug offenses, the operative word being "three". The jurors never had to ask themselves, as *Richardson* requires, "which three?" Absent unanimous agreement, a §848 conviction "in effect, imposes punishment on a defendant for the underlying crimes *without any factfinder having found that the defendant committed those crimes.*" *Richardson*, 526 U.S. at 822 (emphasis added).

The failure to charge the three-or-more-violations element of the §848 offense as defined by *Richardson*[3] and the

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Ross moved prior to trial to dismiss the §848 count for failure to specify the three or more predicate violations alleged to

concomitant failure to instruct the jury that it was required to agree unanimously on the *same* three or more *specific* violations was a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by harmless error standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Structural defects are those which "affect[] the framework within which the trial proceeds, rather than [being] simply an error in the trial process itself." *Id.* at 310. Such errors "infect the entire process," *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), by "depriv[ing] defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 9 (1999), *quoting Rose v. Clark*, 478 U.S. 570, 577-78 (1986).

When the jury is not instructed that it must reach a unanimous verdict as to all elements of the offense, and those elements, *i.e.*, the violations alleged to comprise the continuing series of violations, were not even charged in the indictment, the error is very much akin to a defective reasonable doubt instruction, which a unanimous Court held to be structural error in *Sullivan v. Louisiana*, 508 U.S. 275 (1993):

> In *Fulminante*, we distinguished between . . . "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error standards,"... and trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented[.] . . . Denial of the right to a jury verdict of guilt beyond a reasonable doubt is

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constitute the continuing series of violations. That motion was denied by the district court.

> certainly an error of the former sort, the jury trial guarantee being a "basic protection[]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function. . . . The right to trial by jury reflects . . . "a profound judgment about the way in which law should be enforced and justice administered.". . . The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

Id. at 281-82 (citations omitted). *See also id.* at 284 (Rehnquist, C.J., concurring)(agreeing that "a constitutionally-deficient reasonable-doubt instruction is a breed apart from the many other instructional errors that we have held are amenable to harmless-error analysis"(emphasis omitted); *Carella v. California*, 491 U.S. 263, 268-69 (1989)(Scalia, J., concurring in the judgment).

In the federal system of criminal justice, the right of a criminal defendant not to be convicted except upon a unanimous verdict as to all elements of the offense has long been enshrined as fundamental, like the right not to be convicted except upon proof beyond a reasonable doubt. It is an essential component of the Sixth Amendment jury trial right. *See Richardson*, 526 U.S. at 817; *Johnson v. Louisiana*, 406 U.S. 356, 369-70 (1972)(Powell, J., concurring). Like a constitutionally defective reasonable doubt instruction, the lack of a proper unanimity instruction in a §848 case "vitiates *all* the jury's findings." *Sullivan*, 508 U.S. at 281. This is so because the three or more violations that comprise the series are the central core of the §848 offense – change the violations, and the series changes as well. The other elements of the offense – numerosity, role, and income – can only be found in relation to the specific series identified. *See Richardson*, 526 U.S. at 823. In the absence of a unanimous verdict on three or more specifically identified violations, the jury could not have found that *those violations* had the necessary

relatedness to be found to part of a continuing series of violations, *or* that *that particular series of violations* was committed by the defendant in concert with five or more persons with respect to whom he occupied an organizer, supervisor or management position, *or* that he obtained substantial income or resources from *that particular series of violations*. Because the other elements of §848 can only be found in relation to the particular violations found to constitute the series, it cannot be said, in the absence of the required unanimity instruction, that the jury reached a unanimous, beyond a reasonable doubt, verdict as to the violations which constituted the continuing series *or as to any other element of the offense*, except perhaps the initial triggering violation. Where such is the case,

> [a] reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty."

Sullivan, 508 U.S. at 281, *quoting Rose*, 478 U.S. at 578. *See also California v. Roy*, 519 U.S. 2, 7 (1996)(Scalia, J., concurring).

The courts of appeals which have considered the issue of whether the failure to give the unanimity instruction required by *Richardson* should be subject to review for harmless error have concluded that this Court's decision in *Neder* compels the conclusion that the absence of the unanimity instruction could be classified as trial, rather than structural, error.[4] *See Santana-*

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[4] It does not appear that this Court regarded the matter as a foregone conclusion. In *Richardson*, which was issued ten days before *Neder*, the Court remanded the case to the Court of Appeals, stating "[w]e leave to the Court of Appeals the question of *whether to*

Madera v. United States, 260 F.3d 133, 139-40 (2d Cir. 2001), *cert. denied*, 122 S.Ct. 817 (2002); *Lanier v. United States*, 220 F.3d 833, 838-39 (7th Cir.), *cert. denied*, 531 U.S. 930 (2000); *United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000); *United States v. Long*, 190 F.3d 471, 476 n.3 (6th Cir. 1999); *United States v. Escobar-DeJesus*, 187 F.3d 148, 161-62 (1st Cir. 1999), *cert. denied*, 528 U.S. 1176 (2000). These cases completely fail to recognize the profound difference between the absence of a unanimity instruction and the omission of or misinstruction on a single element of the offense. When the jury was not instructed that it must be unanimous as to the same three or more violations comprising the continuing series of violations, there is, simply, *no* jury verdict which can be upheld through an appellate court's examination of the record to determine whether the jury's verdict would have been the same absent the error. Unanimity is not an element of the offense; it is an indispensable component of the federal jury trial right.

In *Neder*, unlike this case, the defendant was charged with all the elements of the offense; the error was that the judge, rather than the jury, decided the issue of materiality. The Court rejected the argument that the failure to submit an element of the offense to the jury should be regarded as structural error because "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." 527 U.S. at 9. The Court was also of the opinion that, under the circumstances presented in *Neder*, application of harmless error analysis did not do undue violence to the right to trial by jury guaranteed by the Sixth Amendment. *Id.* at 19. *But see id.* at 31-39 (Scalia, J., concurring in part and dissenting in part).The

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engage in harmless error analysis, and if so, whether the error was harmless in this case." 526 U.S. at 824 (emphasis added).

applicability of harmless error analysis to the failure to submit the materiality element to the jury was, the Court concluded, dictated by three prior decisions – *California v. Roy*, 519 U.S. 2 (1996);*Carella v. California*, 491 U.S. 263 (1989); *Pope v. Illinois*, 481 U.S. 497 (1987) – each of which involved only the omission or misdescription of a single element of the offense.

The question thus becomes whether there is a point somewhere along the continuum between an erroneous instruction regarding a single element of the offense and the direction of a verdict for the government on all elements of the offense where the level of violence done to the Sixth Amendment jury trial right becomes too great to permit the upholding of the defendant's conviction under the harmless error standard. As Justice Scalia has posed the question:

> . . . .The Court reaffirms the rule that it would be structural error . . . to "vitiat[e] *all* the jury's findings.". . . A court cannot, no matter how clear the defendant's culpability, direct a guilty verdict. . . . The question that this raises is why, if denying the right to conviction by jury is structural error, taking *one* of the elements of the crime away from the jury should be treated differently from taking all of them away – since the failure to prove one, no less than failure to prove all, utterly prevents conviction.
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> The Court never asks, much less answers, this question. Indeed, we do not know, when the Court's opinion is done, *how many* elements can be taken away from the jury with impunity, so long as appellate judges are persuaded that the defendant is surely guilty. . . . We know that all the elements cannot be taken from the jury, and that one can. How many is too many (or perhaps what proportion is too high) remains to be determined by future improvisation.

Neder, 527 U.S. at 32-33 (Scalia, J., concurring in part and dissenting in part).

Where the jury is not instructed that it must agree unanimously on the three or more violations which comprise the §848 continuing series of violations, the Sixth Amendment jury trial right guaranteed to criminal defendants in federal court is fundamentally undermined. In this case, for example, the jury was left free to roam at large among the uncharged transactions regarding which government witnesses testified and to convict Ross even if each juror had in mind three different violations which he found to be related and to satisfy the five or more persons and substantial income elements. A court could not uphold such a verdict under a harmless error standard without entirely substituting its review function for that which the Sixth Amendment assigns to the jury and *only* to the jury. Specifically, the Court would have to (1) find that the defendant committed three specifically-identified violations, (2) find that those violations constituted a continuing series of violations, (3) find that the defendant undertook those violations in concert with five or more persons (4) as to whom he occupied an organizer, supervisor, or management position, and (5) find that the defendant obtained substantial income or resources from those violations. In sum, the reviewing court would have to perform the jury's function as to *every* element of the offense.

The sheer magnitude of the judicial findings that the reviewing court would be required to substitute for the factfinding which the Sixth Amendment requires to be done unanimously by federal juries convincingly distinguishes *Richardson* error, at least where the defendant has not been charged with and convicted of three or more related violations of the controlled substances laws, from that in *Neder* and this Court's other single element instructional error cases. In cases such as this one, the reviewing court cannot simply examine the record for the evidence regarding a single omitted or

misinstructed element and determine whether the evidence as to that element was so overwhelming that the court can say beyond a reasonable doubt that the jury would have convicted the defendant had it been properly instructed. Instead, the court would effectively become the jury, a result utterly antithetical to the Sixth Amendment jury trial guarantee. Moreover, under circumstances such as those presented here, in which the defendant was not charged with three or more predicate violations, for a court to apply harmless error analysis would be for it to assume the mantle not just of the petit jury but of the grand jury as well. For such convictions to be upheld under a harmless error analysis would not simply be for the wrong entity to judge the defendant guilty but also for the wrong entity to formulate, after the fact, the offense of which the defendant was convicted.

II. IF A HARMLESS ERROR STANDARD IS APPLICABLE, THE CONSTITUTIONAL ERROR SHOULD BE EVALUATED ON COLLATERAL REVIEW UNDER THE *CHAPMAN* HARMLESS BEYOND A REASONABLE DOUBT STANDARD WHERE THE ERROR HAS NOT PREVIOUSLY BEEN AFFORDED *CHAPMAN* REVIEW.

The question of the harmless error standard which should be applied in determining whether relief should be granted under 28 U.S.C. §2255 based on error at trial of constitutional magnitude is one of substantial importance to the administration of criminal justice, and one which has divided the circuits. In this case, as it would be in many cases, the decision whether the *Brecht* or the *Chapman* standard controlled the harmless error analysis was very likely outcome-determinative.[5]

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[5] The fact that the Eleventh Circuit found it necessary to decide whether the *Neder/Chapman* standard or the *Brecht* standard

Ross contends that where, as here, a federal constitutional claim was asserted on direct appeal but summarily rejected based upon then-existing circuit precedent and, hence, was never afforded *Chapman* harmless error review, fairness demands that the *Chapman* review erroneously denied on direct appeal be afforded when, as here, that same claim is again asserted in a §2255 motion after an intervening decision of this Court invalidated the circuit precedent based on which the defendant's constitutional claim was rejected on direct appeal. Under such circumstances, the factors to which this Court pointed in *Brecht* as weighing in favor of the adoption of a less rigorous harmless error standard on collateral review of *state* convictions do not outweigh considerations of equity, fairness, or, most importantly, the paramount need to ensure the reliability and accuracy, within the federal system, of the jury's finding of guilt.

In *Brecht*, the Court began its analysis with the familiar notion that "collateral review is different from direct review," 507 U.S. at 633, but spoke of that difference in terms relevant primarily to collateral review of state convictions:

> Direct review is the principal avenue for challenging a conviction. "When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. *The role of federal proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to*

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governed Ross' entitlement to relief under §2255 suggests that it regarded the issue as one with outcome-determinative significance. If the result would have been the same regardless of which standard was applied, then there would have been no need to resolve this important issue. *See Santana-Madera*, 260 F.3d at 140 (declining to resolve issue because *Richardson* error harmless under either standard).

relitigate state trials."

Id. at 633 (emphasis added), *quoting Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). The most frequently cited reason for distinguishing between direct and collateral review, the Court said, is "the state's interest in the finality of convictions *that have survived direct review in the state court system.*" 507 U.S. at 635 (emphasis added). Other important reasons rest in principles of comity and federalism, the Court continued:

> The states possess primary authority for defining and enforcing criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. *Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.*

Id. (emphasis added), *quoting Engle v. Isaac*, 456 U.S. 107, 128 (1982). Finally, the Court said, "we have recognized that '[l]iberal allowance of the writ . . . degrades the prominence of the trial itself,' . . . and at the same time encourages habeas petitioners to relitigate their claims on collateral review." 507 U.S. at 635, *quoting Engle*, 456 U.S. at 127.

Because the state courts had already reviewed the error under *Chapman* and because "[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and . . . often occupy a superior vantage point from which to evaluate the effect of trial error," 507 U.S. at 636, the *Brecht* Court was of the view that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless error review that *Chapman* requires state courts to engage in on direct review." *Id.* Furthermore, the Court stated, "[o]verturning final and presumptively correct convictions on collateral review because

the state cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters." *Id.* at 637. Based upon these considerations, the Court concluded, "the imbalance of costs and benefits of applying the *Chapman* harmless error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error." *Id.*

Brecht, then, was a case in which the habeas petitioner had already been afforded *Chapman* review of his constitutional claim by the highest court of the state, a context in which concerns of comity and federalism are at their strongest. The question presented here is whether the factors which led the Court to announce a less stringent harmless error standard applicable to collateral review of constitutional errors in *state* criminal proceedings counsel adoption of the *Brecht* standard for collateral review of constitutional error in *federal* criminal proceedings, particularly where, as here, the constitutional claim was rejected on the merits on appeal – erroneously, as we now know – and, hence, the error was never evaluated under the *Chapman* standard.

Most of the circuits have considered the question whether *Brecht* should be applied on collateral review of state convictions even where the constitutional error was not evaluated under *Chapman* on direct review. In *Orndorff v. Lockart*, 998 F.2d 1426 (8th Cir. 1993), *cert. denied*, 511 U.S. 1060 (1994), the Eighth Circuit held that, where the state courts had not afforded the habeas petitioner review of the harmfulness of the constitutional error that occurred at his trial under *Chapman*, the federal courts should apply the *Chapman* harmless beyond a reasonable doubt standard on collateral review once they have determined, contrary to the conclusion of the state court, that federal constitutional error did in fact occur, reasoning that "the *Brecht* rule is based largely on the notion that because the state courts can properly apply the *Chapman* harmless error

standard on direct review, the federal courts need only review those decisions under the *Kotteakos* harmless error standard." *Id.* at 1430. Where, however, the state court had not found constitutional error and, therefore, had not subjected that error to scrutiny under the more exacting *Chapman* standard, federal courts on collateral review should apply the *Chapman* standard. 998 F.2d at 1430.

Agreeing with *Orndorff*, Judge Wood of the Southern District of New York reasoned:

> This court finds the Eighth Circuit position – that *Brecht* does not extend to cases like this one – more persuasive. Not only did *Brecht* twice note that four courts had previously applied *Chapman* to the petition at issue there, but it also emphasized that
>
> > [s]tate courts are fully qualified to identify constitutional error *and evaluate its prejudicial effect* on the trial process under *Chapman*, and state courts often occupy a superior vantage point *from which to evaluate the effect of trial error*. . . . For these reasons, it scarcely seems logical to require federal habeas courts to engage in *the identical approach* to the harmless-error review that *Chapman* requires state courts to engage in on direct review.
>
> 507 U.S. at 636 . . . (citations omitted)(emphasis added). That is, rather than simply invoking comity and federalism alone, *Brecht* explicitly noted state courts' ability *separately* (1) to identify constitutional error, and (2) to evaluate the effect of that error under *Chapman*. . . . *Brecht*'s result, then, was premised largely on respect for the actual, conscientious review of harmlessness performed by the four prior courts – both federal and state – that applied *Chapman*.

Lyons v. Johnson, 912 F.Supp. 679, 688-89 (S.D.N.Y.), *aff'd on other grounds*, 99 F.3d 499 (2d Cir. 1996). In a case arising under §2255, Judge Ward of the Southern District of New York agreed with *Lyons*

> that *Brecht* was premised largely on respect for the actual, conscientious review of harmlessness performed by another court, state or federal. . . . Absent such a review to determine whether an error contributed to conviction "beyond a reasonable doubt," there are compelling reasons for the habeas court to apply *Chapman*. Since the *Chapman* standard applies on direct review in order to ensure accurate determinations of guilt or innocence, it is essential that a prisoner not lose the benefit of that analysis merely because his or her claim is brought in a collateral proceeding. As long as a court – either on direct or collateral review – is the first to conduct a harmless error analysis, it should be required to conduct a *Chapman* analysis in order to "restore our faith in the verdict's accuracy to a reasonable certainty."

Monsanto v. United States, 143 F.Supp.2d 273, 286 (S.D.N.Y. 2001), *quoting Brecht*, 507 U.S. at 654 (O'Connor, J., dissenting).

The majority of circuits have, however, extended *Brecht* to encompass collateral review of state convictions in which no *Chapman* review was conducted in the state court. *See Bains v. Cambra*, 204 F.3d 964, 976-77 (9th Cir.), *cert. denied*, 531 U.S. 1037 (2000); *Gilliam v. Mitchell*, 179 F.3d 990, 995 (6th Cir. 1999), *cert. denied*, 528 U.S. 1120 (2000); *Hassine v. Zimmerman*, 160 F.3d 941, 950-52 (3d Cir. 1998), *cert. denied*, 526 U.S. 1065 (1999); *Hogue v. Johnson*, 131 F.3d 466, 498-99

(5th Cir. 1997), *cert. denied*, 523 U.S. 1014 (1998);[6] *Sherman v. Smith*, 89 F.3d 1143, 1140-41 (4th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997); *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir. 1995), *cert. denied*, 516 U.S. 1123 (1996); *Tyson v. Trigg*, 50 F.3d 436, 446-47 (7th Cir. 1995), *cert. denied*, 516 U.S. 1041 (1996); *Horsley v. Alabama*, 45 F.3d 1486, 1492 n.11 (11th Cir.), *cert. denied*, 516 U.S. 960 (1995).[7]

These decisions as a whole rest on the dual premises that (1) this Court, despite its repeated references to the fact that the petitioner had been afforded *Chapman* review by the state appellate court, did not in fact accord particular significance to that fact, and (2) the concerns which this Court found to weigh in favor of the application of a more forgiving harmless error standard on collateral review of state convictions – comity, federalism, and finality – are implicated whenever a federal court collaterally reviews a state criminal proceeding, regardless of whether the state court had or had not found constitutional error

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Another panel of the Fifth Circuit, in *Barber v. Johnson*, 145 F.3d 234 (5th Cir.), *cert. denied*, 525 U.S. 1005 (1998), regarded *Hogue* as potentially "inconsistent with the Supreme Court's underlying reasoning for applying the *Brecht* standard in federal habeas review," *id.* at 236-37, but felt itself bound to follow *Hogue*. *See also id.* at 237-38 (Dennis, J., concurring specially).

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The Eleventh Circuit cited *Horsley* in support of its rejection of Ross' argument that the *Chapman* standard should be applied under the circumstances of this case. The discussion of the applicable harmless error standard in *Horsley* was, however, limited to a two sentence footnote which gave no reasons for the Court's selection of the *Brecht* standard beyond citing to the rationale underlying *Brecht* – "advancing comity, federalism, finality, and the importance of the trial," *id.* – a rationale of limited applicability to collateral review of *federal* convictions.

and evaluated its harmfulness under the *Chapman* standard. The former premise is convincingly rebutted by the analysis of *Orndorff*, *Lyons*, and *Monsanto*. *Lyons* also contains a convincing rebuttal of the latter premise as well:

> [T]he comity concerns that the *Brecht* plurality opinion raises . . . are far more strongly implicated if federal courts choose to repeat *Chapman* analyses even when state courts have already conducted them, than if federal courts choose to perform *Chapman* analyses that state courts have not performed. The former choice, not the latter, can be construed to convey federal courts' lack of respect for state courts' ability as federal constitutional interpreters, and hence to violate obligations of comity and principles of federalism. Put another way, federal courts should, under *Brecht*, respectfully defer to state courts' analyses of the harmlessness of constitutional error – but where no prior state court *Chapman* holding exists, there is nothing to which to defer.

912 F.Supp. at 689.

When the field of inquiry moves from federal collateral review of state convictions to federal collateral review of *federal* convictions, the comity and federalism considerations which underlay the decision in *Brecht* are nonexistent. The question then becomes whether the remaining concerns which underlay *Brecht* – finality and the importance of the trial process – are, by themselves, sufficient to warrant the application of a less stringent harmless error standard on review of federal convictions under §2255, at least where there has been no prior *Chapman* review. They are not.

Where error of constitutional magnitude occurred during a *federal* criminal trial, there are no finality interests comparable

to those present when a state has tried and convicted a criminal defendant and afforded him full appellate review of his constitutional claims. Moreover, against any generalized interest in finality must be weighed the fact that, in this case, it was the error of a *federal* appellate court which denied the §2255 movant full and fair review of his constitutional claim on direct review. In such cases at least, remedying the error in the §2255 proceeding by providing the review to which Ross was constitutionally entitled on direct appeal should take precedence over abstract notions of finality.

In addition, because the error here went to the very heart of the trial process itself, the importance-of-the-trial rationale of *Brecht* also provides little or no justification for the application of the *Brecht* standard in this context. The very point of *Richardson* is that the requirement that the jury agree unanimously upon the *same* three or more violations is essential to ensure that the jury actually does focus upon just what violations the defendant did or did not commit. Where the jury was not told, as required by *Richardson*, that the violations comprising the continuing series are three *separate* elements of the offense, each of which it must find unanimously and beyond a reasonable doubt, the trial process is not such a reliable determination of guilt as to warrant the additional protection of the *Brecht* standard. Here, there is no principled distinction between Ross' fully preserved and litigated *Richardson* claim and those of defendants who were fortunate enough to be on direct review when *Richardson* was decided.

The circuits which have addressed the issue whether the *Brecht* or the *Chapman* harmless error standard should be applied in proceedings under §2255 have, by and large, simply not stopped to consider the manifest differences between the context in which *Brecht* arose and the §2255 context, or the extent to which the factors on which the Court predicated its decision in *Brecht* are either not relevant or may carry less

weight in the balance in the context of collateral review of federal convictions. For example, the Fifth Circuit in *United States v. Chavez*, 193 F.3d 375, 379 (5th Cir. 1999), and the Eleventh Circuit in *Vines v. United States*, 28 F.3d 1123, 1130 (11th Cir. 1994), simply assumed, without discussion, that the *Brecht* standard applied to all cases on collateral review, regardless of whether that review was of a state or a federal conviction. The First Circuit in *Singleton v. United States*, 26 F.3d 233, 236-37 & n.9 (1st Cir.), *cert. denied*, 513 U.S. 1003 (1994), did little more, indicating in one sentence in a footnote that "we think the *Brecht* rationale – *fundamentally* anchored in traditional concerns for finality – operates with like vigor in the federal habeas context . . . ." *Id.* at 237 n.9 (emphasis in original). *Singleton* failed to recognize the very great extent to which the finality concerns addressed by this Court in *Brecht* were intertwined with the powerful twin concerns of comity and federalism which are present when a federal court collaterally reviews a state conviction. Where comity and federalism concerns are not present, as they are not in the §2255 context, the finality interest is simply that – the interest in having a case over and done with, a legitimate interest, to be sure, but one without the added weight which comity and federalism concerns lend it, and one made less weighty by countervailing considerations not present on collateral review of state convictions.

Where federal courts are conducting collateral review of *federal* convictions, there is an institutional interest in ensuring the constitutional legitimacy of criminal proceedings in the federal criminal system, a goal which can only be reached by evaluating constitutional error under the *Chapman* standard at *some* point in the process; if *Chapman* review is not conducted on direct appeal, then that point must necessarily come where constitutional error is first identified in §2255 proceedings. Under such circumstances, the need to assure the accuracy of the verdict provides a substantial counterbalance to considerations of finality. Moreover, the constitutional issues which federal

courts consider on the merits on collateral review of state convictions would, because of the exhaustion requirement, universally have been presented to, and ruled on by, the state courts in the first instance. By contrast, on §2255 review of federal convictions, the constitutional issues would, because of the prohibition against relitigating in a §2255 motion issues which have already been decided adversely on direct appeal, most likely *not* have been previously ruled on, unless, for example, as here, a subsequent decision of this Court invalidated the pre-existing precedent based on which the movant's constitutional claim was rejected on direct appeal, making the §2255 court the *first* court with the opportunity to consider the impact which the error may have had on the verdict. The interest of the states in the finality of convictions which have been upheld on appeal by state appellate courts which have given full and fair consideration to the petitioners' constitutionally-based challenges to their convictions is considerably stronger than the interests of the federal courts in the finality of federal convictions marred by constitutional error being evaluated for the first time on collateral review. This is especially true where, as here, the §2255 movant had previously sought relief to no avail at trial and on appeal. "[F]ederal trials only achieve a sense of finality and sanctity when a prisoner's allegedly erroneous conviction is adequately reviewed to ensure fairness and accuracy." *Monsanto*, 143 F.Supp2d at 285.

In the context of *Richardson* error specifically, the Sixth Circuit in *Murr,* 200 F.3d at 906, applied the *Brecht* standard on collateral review, apparently on the assumption that, because the *Richardson* issue arose on collateral review, *Brecht* automatically applied. The Seventh Circuit applied the *Neder/Chapman* standard on collateral review of a *Richardson* error in *Lanier*, 220 F.3d at 839, but did not explain the rationale

underlying its application of that standard.[8] The Second Circuit recognized the issue in *Santana-Madera*, 260 F.3d at 140, but found it unnecessary to resolve it in that case.

Only one court has given the question whether *Brecht* or *Chapman* provides the appropriate harmless error standard on §2255 review of a federal criminal conviction where the constitutional error has not previously been evaluated under the *Chapman* harmless beyond a reasonable doubt standard the careful and thoughtful scrutiny which it deserves. *Monsanto*, 143 F.Supp.2d at 280-86, also a case involving *Richardson* error, held that *Neder/Chapman* was the appropriate standard where constitutional error in a federal case had never been reviewed under *Chapman*:

> Having considered the various arguments set forth by the parties and the circuit courts that have addressed this issue, this Court finds that the rationales identified in *Brecht* for applying a less onerous harmless error standard on collateral review do not justify the application of that standard in a §2255 proceeding where there had been no *Chapman* analysis on direct review. . . . [T]he Court can quickly disregard federalism and comity concerns as they have no application to a review of a federal conviction. This

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[8] The very different procedural postures in which the issue reached the appellate courts may go far to explain why each Court appears to have almost taken it for granted that the standard it applied was the correct one – in *Murr*, the defendant did not raise a *Richardson*-type issue on direct appeal, *see United States v. Phibbs*, 999 F.2d 1053, 1086-87 (6th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994), while in *Lanier*, as in this case, the defendant *did* raise the issue at trial and on direct appeal. *See United States v. Kramer*, 955 F.2d 479, 486-87 (7th Cir.), *cert. denied*, 506 U.S. 998 (1992).

leaves the Court with concerns for finality and sanctity of the trial process, which, the Court finds, are insufficient reasons to apply *Brecht* in this case.

Applying the less burdensome harmless error standard on collateral review of a federal conviction where the habeas court is the first to review the error for harmlessness fails to take into account the fundamental purpose served by applying the strict *Chapman* standard. Justice O'Connor, dissenting in *Brecht*, stated:

> If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate equity on the prisoner's side – the possibility that an error may have caused the conviction of an actually innocent person – is sufficient by itself to permit plenary review of the prisoner's federal claim. Whatever the source of the *Chapman* standard, the equities may favor its application on habeas if it substantially promotes the central goal of the criminal justice system – accurate determinations of guilt and innocence.

Monsanto, 143 F.Supp.2d at 285, *quoting Brecht*, 507 U.S. at 652 (O'Connor, J., dissenting).

This Court recognized in *Richardson* the special risks of unfairness present when the jury is, as here, permitted to consider the §848 predicate violations as alternative means rather than as separate and distinct elements of the offense:

> The CCE statute's breadth also argues against treating each individual violation as a means, for that breadth aggravates the dangers of unfairness that doing so would risk. . . . At the same time, the government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in

> numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover-up wide disagreement among the jurors about just what the defendant did, or did not, do. The second consideration considerably aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus on specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*

526 U.S. at 819 (emphasis added). If *Richardson* errors such as that which occurred in this case are to be subject to review for harmless error, this manifest potential for unfairness and inaccuracy demands that the error be afforded *Chapman* harmless beyond a reasonable doubt review to ensure the accuracy and integrity of federal criminal convictions.

The question then becomes how a court is to make the *Neder/Chapman* harmless error assessment. The fundamental flaw in the harmless error analysis conducted by the Court of Appeals is that it looked only to whether there was sufficient evidence generally to permit the jury to find that Ross committed *a* third predicate violation in addition to the two conspiracies of which he was convicted.[9] The very point of *Richardson*,

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[9] Both the district court and the Court of Appeals found the error harmless in this case on the assumption that surely had the jury been properly instructed, it would have unanimously found *a* third violation, without ever identifying a violation that the jury would necessarily have found beyond a reasonable doubt. The Court's reference to a "third" violation stems from its assumption – erroneous,

however, is that it is *not* enough that the jury concluded that the defendant committed a series of violations – *Richardson* requires jury unanimity as to at least three *particular, specifically identified violations. Every* juror must agree, beyond a reasonable doubt, that the defendant committed the *same* three predicate violations, and that those violations were related to each other and that the series so defined satisfied the numerosity, role, and income elements of §848.

That being the case, harmless error analysis must look, not to the evidence as a whole, but instead to the evidence as to

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Ross would contend – that the completely coterminous conspiracies charged in Counts II and III would qualify as two of the three series components.

In many, if not most, of the cases which have subjected *Richardson* error to harmless error analysis, the defendant had also been convicted of a number of substantive offenses in addition to the §848 offense, which the courts pointed to as confirmation that the jury had in fact agreed unanimously on the same three or more offenses. *See, e.g., Santana-Madera,* 260 F.3d at 140-41; *United States v. Stitt*, 250 F.3d 878, 883-84 (4th Cir. 2001), *cert. denied*, 122 S.Ct. 1953 (2002); *United States v. Smith*, 223 F.3d 554, 568 (7th Cir. 2000); *United States v. Jefferson*, 215 F.3d 820, 823 (8th Cir.), *cert. denied*, 531U.S. 911 (2000); *Murr*, 200 F.3d at 906; *Escobar-DeJesus*, 187 F.3d at 62. In other cases, the courts pointed to specifically-identified violations as to which the jury could not have failed to be unanimous. *See, e.g., Lanier*, 220 F.3d at 839; *Romero v. United States*, 2002WL553563 (S.D.N.Y. April 12, 2002); *United States v. Benevento*, 81 F.Supp.2d 490, 493-94 (S.D.N.Y. 2000); *see also Monsanto*, 143 F.Supp.2d at 287-92. So far as Ross' research has revealed, the only cases which have upheld §848 convictions in the face of *Richardson* error without specifically identifying violations that the jury would necessarily have found beyond a reasonable doubt have been reviewed under a plain error standard. *See, e.g., United States v. Richardson*, 233 F.3d 223, 229-30 (4th Cir. 2000), *cert. denied*, 122 S.Ct. 1806 (2002).

each potential predicate violation. If the violations are analogized to omitted elements, then *Neder* dictates that "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." 527 U.S. at 18. If, however, the defendant contested the missing element, the court must determine whether the "record contains evidence that could rationally lead to a contrary finding with respect to that omitted element. *Id.* at 19.

> [I]f the element was genuinely contested, and there is evidence upon which a jury could have reached a contrary finding, the error is not harmless. It is not harmless because, in that circumstance, we cannot determine beyond a reasonable doubt that the "jury verdict would have been the same absent the error."

United States v. Brown, 202 F.3d 691, 701 (4th Cir. 2000), *quoting Neder*, 527 U.S. at 19. As applied to the absence of a *Richardson* unanimity instruction, if there is evidence based on which the jury could have disagreed about whether the defendant committed a particular violation, or whether that violation formed a "continuing series with other violations, then the error cannot be held harmless. Only if there is a specific related violation which a rational jury could not have failed to find unanimously beyond a reasonable doubt could the error be said, under the *Neder* analysis, to be harmless beyond a reasonable doubt.

The appropriate question is not, therefore, whether there was evidence from which the jury could have unanimously concluded that the defendant committed three or more violations. Harmless error analysis which fails to look at the evidence as to each potential predicate violation is inconsistent with the

concern that this Court expressed in *Richardson* that "treating violations simply as alternate means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover-up wide disagreement among the jurors about just what the defendant did or did not do." 526 U.S. at 819. Upholding a CCE conviction on the theory that the government's witnesses testified to so many transactions that the jury surely would have unanimously found at least one substantive violation is flatly inconsistent with the reasoning underlying *Richardson*. *Richardson* error may be held harmless only if there is a specifically-identified violation as to which there was no evidence which could rationally have led to the jury's inability to find unanimously, beyond a reasonable doubt, that the defendant committed *that specific violation*.[10]

At the trial of this case, Ross contested *every* transaction and provided the jury with ample reason to disbelieve the testimony of *each* of the government's witnesses. He also strenuously contested other evidence which the government contended linked him with certain drug transactions. The record in this case contained evidence that could rationally have led the jury to disagree regarding whether Ross committed each of the

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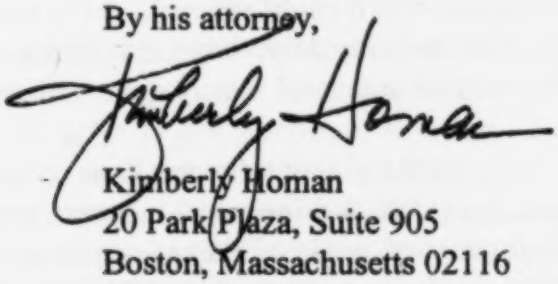
[10] This case also presents the subsidiary issue of where a court may look for the predicate violations to which it will apply its harmless error analysis. *Richardson* held that the three or more violations comprising the continuing series are elements of the offense, and, that being the case, it is axiomatic that they must be charged in the indictment. Ross' CCE conviction cannot, therefore, be upheld without convicting him of an offense with which he was not charged. There being no controlled substances offenses charged in the indictment other than the two conspiracy offenses, *but see* note 9, *supra*, there are no additional predicate violations to which harmless error analysis may permissibly be applied. *See Monsanto,* 143 F.Supp.2d at 287 n.10.

transactions as to which the government's highly impeached witnesses testified. The failure to give the required unanimity instruction was not harmless beyond a reasonable doubt.[11]

CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
By his attorney,



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[11] Even were the *Brecht* standard to be applied, the error here had a substantial and injurious effect on the verdict, especially in light of the indictment's failure to charge the three or more violations alleged to constitute the series.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.01-12338

District Court Docket No.
97-00008-CV-1-MMP

ALLAN ROSS,

Petitioner-Appellant,
versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: April 19, 2002
For the Court: Thomas K. Hahn, Clerk
By: Gilman, Nancy

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12338

D.C. Docket Nos. 97-00008 CV -1-MMP
and 89-01007-CR-1-M

ALLAN ROSS,

Petitioner-Appellant,
versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(April 19, 2002)

Before EDMONSON, HILL and LAY*, Circuit Judges

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*Honorable Donald P. Lay, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

PER CURIAM:

Petitioner Allan Ross, a federal prisoner, appeals the district court's denial of his 28 U.S.C. §2255 motion for habeas relief. We conclude that the district court correctly denied Petitioner's section 2255 motion, and we affirm that ruling.

In 1992, Ross was tried under a three-count indictment for engaging in a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. §848 (Count I), conspiracy to import cocaine and marijuana in violation of 21 U.S.C. §§ 952, 963 (Count II), and conspiracy to possess with intent to distribute cocaine and marijuana in violation of 21 U.S.C. §§ 841, 846 (Count III). At trial, he requested a jury instruction requiring the jury to agree unanimously on which offenses constituted the continuing series of violations of the CCE charge. The district court, pursuant to Circuit precedent at that time, denied Ross's request. The jury convicted Ross on all three counts, and he was sentenced to three concurrent life sentences and fined $2 million pursuant to Count I and $4 million each pursuant to Counts II and III.

On direct appeal, Ross argued, among other things, that the district court's failure to give his requested unanimity instruction constituted reversible error. We affirmed Ross's conviction and sentencing. *See United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994). Ross filed a petition for habeas relief under 28 U.S.C. §2255 and a motion for a new trial. While his section 2255 motion was pending, the Supreme Court decided *Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707 (1999), in which the Court concluded that "a jury has to agree unanimously about which specific violations make up the continuing series of violations make up the 'continuing series of violations'" of a CCE charge. *See Richardson*, 526 U.S. at 815, 119 S.Ct. at 1708. The district court denied all claims raised in Ross's original section 2255 motion but granted Ross leave to amend his petition to add a claim based on *Richardson*.

The district court ultimately denied Ross habeas relief on his *Richardson* claim. The district court concluded that, while *Richardson* does apply retroactively to cases on collateral review, *Richardson* error was subject to review for harmless error. And the district court determined that the failure to give a unanimity instruction at Ross's trial constituted harmless error.
We granted a certificate of appealability on whether Ross was due relief in light of *Richardson*.[1]

The district court's determination that the rule articulated in *Richardson* should be applied retroactively to cases on collateral review is an issue of law to be examined *de novo*. Our sister circuits which have addressed this issue have concluded that *Richardson* does apply retroactively to cases on collateral review. *See Santana-Madera v. United States*, 260 F.3d 1333, 139 (2d Cir. 2001); *United States v. Lopez*, 248 F.3d 427, 432 (5th Cir. 2001); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000).

The government contends that *Teague v. Lane*, 489 U.S. 288, 109 S.Ct 1060, 1075 (1989), under which new constitutional rules of criminal procedure are generally inapplicable to cases on collateral review, bars application of the rule in *Richardson* in this case. *Teague*'s bar, however, does not apply when the Supreme Court decides a new substantive rule of criminal law as opposed

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[1] We, because no certificate of appealability was granted about insufficiency of the indictment issue, decline to address Ross's argument on that issue. *See Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998)("[A]ppellate review is limited to the issues specified in the [certificate of appealability]."). In this case, we granted a certificate of appealability on the following issue: "whether Appellant's rights were violated in light of [*Richardson*], by the trial court's *jury instruction* regarding the elements of the [CCE] offense." (emphasis added).

to a new procedural rule. And a new rule is substantive when it interprets "the meaning of a criminal statute enacted by Congress" so that the conduct for which a defendant was convicted my no longer be illegal. *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 1610 (1998).

In *Richardson*, the Supreme Court concluded that 21 U.S.C. §848's 'series of violations,' each of which the jury must agree on unanimously. *Richardson*, 526 U.S. at 824, 119 S.Ct. at 1713. Therefore, the Court changed the elements of the CCE offense and, thus, changed the meaning of the statute.

We reject the government's contention that *Richardson* is akin to the decision in *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 2319-20 (1995), in which the Supreme Court concluded that materiality was an element to be decided by the jury (and not by the district court) and which we have held is inapplicable to cases on collateral review. In *Gaudin*, neither party disputed that materiality was an element of the charged offense; instead, they disputed who decided that element. In contrast, pre-*Richardson*, a jury was required to find that the accused committed a series of offenses; the jurors, however, were not required to agree on what specific predicate offenses comprised the series. Post-*Richardson*, if jurors cannot agree on what specific offenses make up the continuing series, the jury may not convict the accused of the CCE offense. Therefore, we join our sister circuits in concluding that *Richardson* set out a new substantive rule of criminal law which applies retroactively to cases on collateral review.

Having determined that *Richardson* applies retroactively to cases on collateral review, we must next decide whether harmless error analysis applies to *Richardson* error. The courts of appeals which have addressed this issue have concluded that *Richardson* error is subject to harmless error analysis. *See Santana-Madera v. United States*, 260 F.3d 133, 139-40 (2d Cir.

2001); *Lanier v. United States*, 220 F.3d 833, 838-39 (7th Cir. 2000); *United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000); *United States v. Long*, 190 F.3d 471, 476 n.3 (6th Cir. 1999); *United States v. Escobar-DeJesus*, 187 F.3d 148, 161-62 (1st Cir. 1999). We agree. A jury instruction which omits an element of the charged offense is generally subject to harmless error analysis. *See Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 1833 (1999)("[A]n instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."). Structural error, to which harmless error analysis does not apply, occurs only with "extreme deprivations of constitutional rights, such as denial of counsel, denial of self-representation at trial, and de3nial of a public trial." *United States v. Nealy*, 232 F.3d 825, 830 n.4 (11th Cir. 2000). And we conclude that instructional error under *Richardson* is not structural error, but instead is subject to review for harmless error.

The parties dispute precisely which harmless-error standard is applicable in this case. In *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 1721-22 (1993), the Supreme Court concluded that the appropriate standard for reviewing the harmlessness of a non-structural constitutional error on collateral review of a state court judgment is the standard enunciated in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239 (1946). Under that standard, a defendant is entitled to habeas relief when an error results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638, 113 S.Ct. at 1722. Ross, however, contends that the instructional error in this case should be evaluated under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967). He offers two reasons for this assertion.

Ross notes that, because *Brecht* involved the habeas review of a state court conviction, the Supreme Court relied on

principles of comity and federalism, as well as the State's interest in the finality of convictions and the extraordinary nature of habeas relief, in concluding that the more relaxed *Kotteakos* standard should apply in reviewing harmlessness of error during collateral review. *See Brecht*, 507 U.S. at 637, 113 S.Ct. at 1721-22. And, in *Brecht*, the state court had already evaluated the error under the more stringent *Chapman* standard on direct appeal. *See id.* at 636, 113 S.Ct. at 1721-22. Therefore, Ross contends, *Brecht*'s relaxed harmless error standard should apply only when a federal appellate court is reviewing a state conviction in which the alleged error has been evaluated under the more stringent *Chapman* standard on direct appeal.

Only the Sixth and Seventh Circuits have addressed which harmless error standard is appropriate when reviewing *Richardson* error on habeas review.[2] The Sixth Circuit has concluded that the *Brecht* standard applied, *see Murr*, 200 F.3d at 906 while the Seventh Circuit has applied the harmless-beyond-a-reasonable-doubt standard of *Chapman*. *See Lanier*, 220 F.3d at 839.

We conclude that the Sixth Circuit is correct and that application of the *Brecht* standard to *Richardson* error on collateral review is the appropriate approach. In this Circuit, we apply the *Brecht* harmless error standard to the habeas review of federal court convictions, as well as state court convictions. *See*

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The Second Circuit has also been confronted with a collateral attack of a CCE conviction because of *Richardson* error. But that court declined to decide what harmless error standard was appropriate – *Brecht* or *Neder* – after concluding that the *Richardson* error in that case was harmless under either standard. *See Santana-Madera*, 260 F.3d at 140. The Second Circuit did say that, generally, when evaluating convictions on collateral review the *Brecht* standard was appropriate. *Id.*

Vines v. United States, 28 F.3d 1123, 1130 (11th Cir. 1994). And we, when looking at state decisions, have rejected the theory that the *Brecht* standard only applies to convictions which have been previously reviewed under the *Chapman* standard. *See Horsley v. Alabama*, 45 F.3d 1486, 1492 n.11 (11th Cir. 1995). Ross offers no compelling argument for why we should treat federal convictions differently. We, therefore, conclude that the *Brecht* standard for harmless error applies to our habeas review of the *Richardson* error at Ross's trial.

We must now consider whether the district court's failure to give a unanimity instruction as required by *Richardson* constitutes harmless error under *Brecht* in this case. When reviewing the harmlessness of an error under the *Brecht* standard, "[i]f, when all is said and done, the [court's] conviction is sure that the error did not influence, or had but very slight effect, the verdict and the judgment should stand." *O'Neal v. McAninch*, 513 U.S. 432, 115 S.Ct. 992, 995 (1995)(quoting *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). But if a federal court is "in grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict, that error is not harmless." *Smith v. Singletary*, 61 F.3d 815, 818-19 (11th Cir. 1995)(quoting *O'Neal*, 513 U.S. at 436)(applying *Brecht* standard).

The "continuing series" of a section 848 offense is made up of at least three connected violations of the controlled substances laws. *See United States v. Alvarez-Moreno*, 874 F.2d 1402, 1408 (11th Cir. 1989), *cert. denied*, 494 U.S. 1032 (1990). And in this Circuit, a controlled substance conspiracy conviction may count as a predicate offense of a CCE charge. *See United States v. Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987). Here, Ross' two conspiracy convictions make up two of the three controlled substances offenses necessary to sustain the CCE conviction. Still, no third, connected conviction exists which would complete the continuing

series of the CCE. Thus, we must look to the record to determine whether we have at least "grave doubt" about whether the absence of a *Richardson* instruction in this case had "substantial and injurious effect or influence in determining the jury's verdict." *Smith*, 61 F.3d at 819. In other words, we must determine whether grave doubt exists on whether the jury would have unanimously found that Ross committed a third connected violation of the controlled substances laws if a *Richardson* instruction had been given.

Having conducted a close review of the record, we cannot conclude that the absence of a *Richardson* instruction had substantial and injurious effect on the jury's verdict in the CCE charge.[3] We have no doubt that the jury would have unanimously concluded that Ross committed a third connected controlled substances offense had a *Richardson* unanimity instruction been given. At trial, more than fifteen witnesses for the Government testified about Ross's participation in hundreds of controlled substance offenses. That the jury found Ross guilty of the two conspiracy charges evidences that the jury believed the testimony of at least some subset of the Government's witnesses, in spite of Ross's attacks on the witnesses' credibility. We agree with the district court that it is virtually inconceivable that the jury would have unanimously agreed that Ross committed the conspiracy offenses and yet would not have unanimously agreed that Ross committed at least one specific offense of the hundreds of uncharged controlled substances offenses in evidence. Thus, because we cannot discern that, in this case, the *Richardson* error had a substantial and injurious effect on the jury's verdict in the

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[3] Ross's criminal trial lasted over six weeks in which more than fifteen witnesses testified for the Government. See our decision on direct appeal, *United States v. Ross*, 33 F.3d 1507, 1510-12 (11th Cir. 1994), for a more complete factual description of the evidence presented at trial.

CCE offense, we affirm the district court's order denying Ross habeas relief.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12338-FF

ALLAN ROSS,

Petitioner-Appellant

versus

UNITED STATES OF AMERICA,

Respondent-Appellee

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion_____, 11th Cir., 19__, ___ F.2d ___).

Before: EDMONSON, HILL and LAY*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing en banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

* Honorable Donald P. Lay, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-12338-FF

ALLAN ROSS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee

On appeal from the United States District Court for the Northern District of Florida

---

BEFORE: EDMONSON, HILL and LAY*, Circuit Judges

PER CURIAM:

The petition(s) for rehearing filed by Appellee is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

* Honorable Donald P. Lay, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Supreme Court, U.S.
FILED

No. 02 907 NOV 7 - 2002

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2002

ALAN ROSS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

UNITED STATES OF AMERICA

vs. **1:89CR01007-MMP**
1:97CV8-MMP

ALAN ROSS,

Defendant.

_____/

SECOND REPORT AND RECOMMENDATION

The court remanded the *Richardson* claim for further briefing and a supplemental report and recommendation. Doc. 693. The government filed a supplemental brief, Doc. 697, and Defendant filed a reply. Doc. 702. Much of the undersigned's previous analysis of this claim has not been challenged. This report and recommendation, however, repeats those passages from the earlier recommendation so that the court has a complete report and recommendation.

Additionally, the defendant filed a motion to amend his §2255 motion to add a claim arising under *Apprendi v. New Jersey*, 530 U.S. __, 120 S.Ct. 2347, 147 L.Ed.2d 435 (2000). Doc. 696. Both parties have also filed notices of supplemental authority. Docs. 703 and 704.

The *Richardson* Claim

Defendant contends that his conviction of the continuing criminal enterprise (CCE) in violation of 21 U.S.C. §848, must be vacated due to *Richardson v. United States*, 526 U.S. 813,

119 S.Ct. 1707, 143 L.Ed.2d 435 (1999). The Court in *Richardson* concluded that jury "unanimity in respect to each individual violation is necessary." 119 S.Ct. at 1709.

The court did not instruct the jury that it had to be unanimous in its verdict as to each individual violation it found with respect to count I. Doc. 528, vol. 38, pp. 149, 138-39. The court instructed the jury that:

> A "continuing series of violations" means proof of at least three violations of the federal controlled substances law, and also requires a finding that those violations were connected together as a series of related or ongoing activities, as distinguished from isolated or disconnected acts. It is not necessary that an offense be charged in order for it to constitute part of a continuing series of violations.

Doc. 702, pp. 1-2.

Defendant preserved this issue at trial, doc. 420 (requested instruction 20) and on direct appeal. *United States v. Ross*, 33 F.3d 1507, 1525, n.32 (11th Cir. 1994), *cert. denied*, 515 U.S. 1132 (1995). Had defendant's conviction still been pending on direct appeal, the interpretation of §848 in *Richardson* would have applied. *E.g.*, *United States v. West*, 201 F.3d 1312 (11th Cir. 2000). Thus, defendant did not procedurally default as to his *Richardson* claim. Further, since *Richardson* is a change of law which was not available when defendant took his appeal, that he lost the claim on his direct appeal is not a bar to reconsideration of the claim via a §2255 motion. *Davis v. United States*, 417 U.S. 333, 342, 94 S.Ct. 2298, 2303, 41 L.Ed.2d 109 (1974).

New rules of criminal procedure are not applied on collateral review. *United States v. Brown*, 117 F.3d 471, 479

(11th Cir. 1997), relying on *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). But *Teague* does not apply when the Supreme Court "decides the meaning of a criminal statute enacted by Congress." *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 1610, 140 L.Ed.2d 828 (1998); *Brown*, 117 F.3d at 479, construing *Teague* and quoting *In re Blackshire*, 98 F.3d 1293, 1294 (11th Cir. 1996)("the Supreme Court does 'not express a new rule of constitutional law . . . [when] it merely interpret[s] a substantive criminal statute using rules of statutory construction'").

The few appellate cases that have considered the question have held that *Richardson* interpreted the substantive provisions of a criminal statute. Applying the *Bousley* loophole to *Teague*, those courts have held that *Richardson* should be applied retroactively on review of an otherwise timely §2255 motion.[1]

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[1] The government did not argue that the claim is premature under 28 U.S.C. §2255, first subparagraph (3). Doc. 686 p.7 (recognizing the exception where a new right is to be given retroactive application in collateral proceedings). There are conflicting opinions on this subject. *E.g.*, *United States v. Lloyd*, 188 F.3d 184, 188 and n.10 (3d Cir. 1999)(recognizing the problem and citing several cases reaching different results); *compare*, *United States v. Lopez*, ___F.3d___, No. 99-31282, 2000 WL 1715915 (5th Cir., Dec. 5, 2000)(holding that a first §2255 motion bringing a *Richardson* claim, which is otherwise beyond the first year from the date the conviction was final, is untimely because neither the Supreme Court itself nor the Fifth Circuit has yet made *Richardson* retroactive on collateral review). Since the government has not raised this issue, this court need not decide it. However, since the court must address subject matter jurisdiction *sua sponte* , the following is noted with regard to the court's jurisdiction. For the initial §2255 motion, the one year period begins in part from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable

Murr v. United States, 200 F.3d 895, 9[0]5-906 (6th Cir. 2000) and *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000)(both citing *Bousley*). These cases are clearly correct. *See also, Benevento v. United States*, 81 F.Supp.2d 490, 493 (S.D.N.Y. 2000). *Richardson*, therefore, should apply to cases on collateral review.

The lack of an instruction that the jury had to reach a unanimous decision as to three or more of the "violations" in the "continuing series" to convict under 21 U.S.C. §848 was error as later revealed by *Richardson*, but it is subject to harmless error analysis. *Murr*, 200 F.3d at 906; *Lanier*, 220 F.3d at 839; *United States v. Escobar-deJesus*, 187 F.3d 148, 161-162 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 1208 (2000); *United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000); *United States v. Smith*, 223 F.3d 554, 567 (7th Cir. 2000), *pet. cert. filed* Nov. 15, 2000; *United States v. Jefferson*, 215 F.3d 820, 823 (8th Cir. 2000); *United States v. Long*, 190 F.3d 471, 476 n.3 (6th Cir. 1999), *cert. denied*, 120 U.S. 555 (1999); *Neder v. United States*, 527 U.S.

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to cases on collateral review. §2255, first subparagraph (3). This language is different from the provision for a second motion, which explicitly requires that the question of retroactivity be decided by the Supreme Court itself. *Compare, In re Joshua*, 224 F.3d 1281 (11th Cir. 2000). Moreover, the right was recognized in *Richardson*, the motion to amend in this case came within the one year following *Richardson*, and the claim has been made retroactively applicable to §2255 cases by *Murr* and *Lanier*. But even if retroactivity must be decided by this circuit or the Supreme Court under §2255, first subparagraph (3), this is a statute of limitations and not a jurisdictional bar. *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)(citations omitted); *Akins v. United States*, 204 F.3d 1086, 1089 (11th Cir. 2000)(quoting *Sandvik*). As such, it is unlikely that the first subparagraph (3) of §2255 is a statute which governs the *accrual* of a claim based upon which court has decided that it is to be retroactively applied on a post-conviction motion. Finally, at worst Defendant's *Richardson* claim here is only premature, not untimely.

1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)(erroneous jury instruction omitting an element of the offense is subject to harmless error review).

"[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Neder*, 119 S.Ct. at 1837. The question is whether "[i]s it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Id.*, 119 S.Ct. at 1838.

> Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless.

Id.

"[A] court, in typical appellate fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id.*, 119 S.Ct. at 1839. In sum, the court must first determine whether the element was "genuinely contested," and if it was, then the court must determine whether "there is evidence upon which a jury could have reached a contrary finding." *Brown*, 202 F.3d at 701; *United States v. Nealy*, ___F.3d___, No. 99-15211, 2000 WL 1670932 (11th Cir. Nov. 7, 2000)("we must affirm Defendant's sentence if the record does not contain evidence that could

rationally lead to a contrary finding with respect to [the element of] drug quantity."). If there was evidence upon which a rational jury could have found for defendant, the error is not harmless. *Brown*, 202 F.3d at 701 and n.19. The burden of proving harmless error is on the government. *United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999)(on remand).

An element of a §848 offense is a continuing series of at least three violations. *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1408 (11th Cir. 1989), *cert. denied*, 494 U.S. 1032 (1990); *United States v. Brantley*, 733 F.2d 1429, 1436 (11th Cir. 1984); *United States v. Graziano*, 710 F.2d 691, 697 n.11 (11th Cir. 1983); *United States v. Phillips*, 664 F.2d 971, 1013 (5th Cir. 1981)(Unit B), *cert. denied*, 457 U.S. 1136 (1982). This circuit, as do at least eight others,[2] counts a controlled substance conspiracy conviction as a §848 predicate violation. *United States v. Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987). An overt act in violation of the drug laws not charged in a separate count and thus, which does not result in a separate conviction, may also count as one of the predicate violations for a §848 charge. *Id.*

Consequently, the circuits also uniformly hold that if a defendant is charged and convicted of three or more subsidiary controlled substances offenses, and assuming that the evidence that the subsidiary charged offenses were related is not controverted, the error is harmless. *Escobar-deJesus*, 187 F.3d at 162; *Murr*, 200 F.3d at 906; *Long*, 190 F.3d at 476 n.3; *Smith*, 223 F.3d at 568. The jury *necessarily* convicted of at least three predicate offenses since they convicted of the three offenses charged and those count as predicate offenses. *Brown*, 202 F.3d at 700. *Cf., United States v. Miller*, 22 F.3d 1075, 1079 (11th Cir.

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[2] *United States v. Harris*, 959 F.2d 246, 307 and n.7 (D.C.Cir.), *cert. denied*, 506 U.S. 932 (1992).

1994)(no plain error in money laundering conviction, despite erroneous instruction, where the jury found the predicate federal offenses when it convicted of other charges in the indictment).

Here, however, Defendant was convicted of only two offenses which may be considered as predicates for count I. Defendant was convicted of count II, a conspiracy to import controlled substances, cocaine and marijuana, and count III, a conspiracy to possess with intent to distribute controlled substances, cocaine and marijuana. Doc. 431 (verdict); Doc. 10 (indictment). A third connected predicate offense is needed to find the error not harmless.

Defendant argues that because he cannot now argue that his convictions for counts II and III, when combined with the conviction for count I, violate double jeopardy, then those convictions cannot be considered for purposes of harmless error and a *Richardson* claim.[3] This is not persuasive. The potential infirmity of the convictions due to double jeopardy with count I does not erode the probative value of the convictions for harmless error analysis with respect to the *Richardson* claim. The harmless error question is whether it is beyond a reasonable doubt that the jury would have convicted Defendant on count I had it been instructed as *Richardson* now requires. That the jury reached unanimous verdicts as to counts II and III means that they found two of the requisite three continuing violations for count I. Further, that unanimous verdicts were reached as to counts II and II[I] has other probative value for the harmless error analysis.

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The court ruled that this double jeopardy claim, based upon *Rutledge v. United States*, 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996)(which was decided on March 27, 1996), was not timely presented and cannot now be considered. Doc. 693, p.4.

The issue, then, is whether the government has shown beyond a reasonable doubt that the jury would have unanimously found at least one other continuing violation had it been properly instructed. The answer is not provided by the convictions of counts II and III standing alone. "To prove the conspiracy, the government was required to show an agreement by two or more persons to commit the substantive offense, [defendant's] knowledge of the agreement, and her voluntary joinder in the enterprise." *United States v. Stanley*, 24 F.3d 1314, 1319 (11th Cir. 1994). Commission of a substantive drug offense, therefore, is not an element of a drug conspiracy,[4] and the court so instructed: "Now as to Counts two and Three, you will note that the defendant is not charged in those counts with actually violating Title 21, United States Code, sections 952 and 841. Rather, he is charged with having conspired to do so, in violation of title 21, United States Code, Sections 963 and 846." Doc. 528, vol. 38, p.137. As a consequence, it cannot be said that the two convictions on counts II and III necessarily supplied a unanimous verdict as to some third violation of the controlled substances laws. Therefore, the court must look to the record.

The *Brown* case from the Fourth Circuit is still the only *Richardson* case like the case at bar.[5] In *Brown*, the defendant

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[4] Thus, while an indictment must charge agreement to commit the substantive offense as an element of the conspiracy, the substantive offense so alleged is not a substantive offense for purposes of the Speedy Trial Act. *United States v. Derose*, 74 F.3d 1177, 1183 (11th Cir. 1996).

[5] In *Lanier*, the court found the error to be harmless because the defendant had conceded that he "bought and sold marijuana, and he did it for a number of years." 220 F.3d at 839. The court also found that the forfeiture verdict had established unanimity as to four continuing drug offenses. *Id.*, at 840. *Lanier* is not helpful to this stage

was convicted of a CCE charge, one count of a conspiracy to violate the drug laws, and four counts of money laundering. As in the case at bar, there was "voluminous testimony" and the Government did not specifically identify the CCE predicate offenses until closing argument. The *Brown* court, therefore, looked to the evidence submitted to support the offenses argued in closing argument. 202 F.3d at 701-702.

The court noted that defendant Brown had attempted to impeach each of the ten witnesses supporting each of the offenses argued in closing. *Id.*, at 702. Each witness had a substantial criminal record which defendant exposed to the jury on cross examination. *Id.* The court also noted that the credibility of five of the witnesses had been impeached in other ways. Witness Bynum had contradicted himself and was unsure as to the connection of defendant to one drug transaction. *Id.*, at 702. Lark could not remember specific details of the predicate violations. Adams and Sloan were impeached by prior inconsistent statements. Morrow could not remember her own criminal record and said she dealt drugs with defendant Brown when he was incarcerated. *Id.* The *Brown* court concluded:

> Brown thus genuinely contested the evidence supporting each of the alleged predicate offenses, and there was a basis in the record for the jury to have rationally disbelieved the testimony of any of the government's witnesses. Put simply, the Government's case turned upon the credibility of witnesses whose vulnerabilities were exposed by Brown's lawyers, and we are unable to discern

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of the court's analysis, as defendant neither conceded that he committed controlled substances violations, nor was there a forfeiture charge with subsidiary allegations of specific controlled substances violations.

> which of these witnesses were actually believed and relied upon by the jury. Our uncertainty is amplified by the fact that the jury was not given an enumeration of the possible predicate offenses that could constitute the "continuing series." This factual setting leads us to conclude: (1) that omitting the *Richardson* instruction could have "permitt[ed the] jury to avoid discussion of the specific factual details of each violation," thus potentially covering-up "wide disagreement among the jurors about just what the defendant did, or did not, do"; and (2) that the jurors could have failed to focus upon specific factual details in the absence of a *Richardson* instruction, "simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." *Richardson*, 119 S.Ct. at 1711. As the Supreme Court has indicated, these are two of the uncertainties sought to be avoided by a *Richardson* instruction. In the absence of such an instruction, we run head-on into each of them in this case.

In this circuit, however, whether the defendant "contested" the omitted element "may be considered but is not the pivotal concern. Instead, what the evidence showed regarding [the omitted element] is the touchstone." *Neder* (on remand), 197 F.3d at 1129 (rejecting the argument that an error in failing to instruct on an element of an offense is harmless only if the element was both uncontested and the evidence was overwhelming). The court instead found that any error may be harmless if the evidence was overwhelming as to the omitted element of the offense. *Id.*

The review which followed in *Neder* on remand is not especially helpful here, however. The missing element in that

case was the "materiality" of false statements made relative to federal mail fraud, wire fraud, and bank fraud charges in violation of 18 U.S.C. §§1341, 1343, and 1344. The Supreme Court had held a false statement in this context is "material" if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed." 197 F.3d at 1128, *quoting* 119 S.Ct. at 1837. Review of that issue was rather simple since it was undisputed that ceratin statements were made. The court only had to look at the statement in the context of the transaction to determine if it was "material" to the transaction as a matter of law. Further, even in those instances where the defendant had presented evidence that the particular decision maker was not in fact influenced by the statement because the decision maker knew it to be false, that was not evidence that the statement was immaterial since, again as a matter of law, "a false statement can be material even if the decision maker did not actually rely on the statement." 197 F.3d at 1128, 1133. In other words, the court *Neder* on remand did not identify any evidence presented by the defendant Neder upon which a jury might rationally have found a particular statement to have been immaterial.

Defendant Ross has shown that he "contested the credibility of each of the witnesses who testified as to controlled substances offenses which he allegedly committed and which were highlighted by the government's final argument. Had the jury entertained a reasonable doubt as to the credibility of these witnesses, it would not have found that he committed any of the controlled substances offenses which they described. And were this court governed by the *Brown* decision, it is probable that the error would not be harmless.

But in this circuit, that Defendant contested the credibility of the witnesses is not the pivotal question. Instead, the court must look to "what the evidence showed regarding [the omitted element]." *Neder* (on remand), *supra*. The question

whether the record contains "evidence that could rationally lead to a contrary finding" with respect to the last predicate offense to sustain a conviction for count I. *Nealy, supra.*

The nature of the evidence presented by Defendant in his defense is important. Some of the evidence was to reveal inconsistencies in the witness's testimony as to specific factual details when compared to that witness's testimony or the testimony of other witnesses. *E.g.*, Raul and Roberto Aspuru, Arturo Caradoza, Thomas Pritchett, John Quitoni, and James Allardyce. Doc. 702, pp. 9-10, 13, 15, 17-18. It takes little imagination to imagine a potential case where a rational jury might have refused to find a specific uncharged violation where there were important inconsistencies in the testimony supportive of that specific offense.

But the challenge to the credibility of ten witnesses, Bert Gordon, Russell Brothers, Robert LeClerc, Robert Moore, David Sabio, Jean Marie Lemieux, Gaspar Sanchez, Gaetan LaFond, Jr., Gaetan La Fond, Sr., and possibly Richard Tavares, was *only* a general attack upon their credibility.[6] Doc. 702, pp. 8-17. In each case, Defendant showed that the witness may have had a general propensity to lie because of prior criminal convictions, prior criminal offenses, prior untruthful statements, or a desire to earn a substantial assistance motion or other leniency. This is important, because we know that the jury convicted of counts II and III, the conspiracy charges. This means that the jury did not have a reasonable doubt as to the general credibility of at least some of the witnesses presented by the Government, despite the fact that Defendant generally contested their credibility. It is true that the individual jurors might have disagreed as to whom among the witnesses presented by the Government was credible

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[6] Defendant also *generally* attacked the credibility of the first six witnesses.

enough to support unanimous verdicts as to counts II and III, but it is also inescapably true that the jurors reached unanimous agreement that some subset of witnesses, if not all, were generally credible despite evidence to the contrary.

Second, it is undisputed that with the exception of Alvaro Gaspar Sanchez, each of the witnesses testified as to three or more controlled substance offenses committed by Defendant, and hundreds of such offenses were in evidence. This was clearly a trial with overwhelming evidence. There is simply no likelihood at all that the convictions for conspiracy in counts II and III *only* reflect the unanimous agreement of the jury that Defendant had an agreement with others to commit controlled substances offenses without a unanimous finding that he committed at least one of the hundreds of uncharged offenses in evidence. After all, the jury was charged that they had to find three such offenses, not just one. Further, the likelihood that, if properly charged, one member of the jury would have had a reasonable doubt that Defendant did not commit even *one* of these uncharged controlled substances offenses, having found at least some of the witnesses credible enough to join the other jurors in a verdict of guilty of the general conspiracy offenses in counts II and III, is nil.

Finally, there was no contention at all by Defendant that the uncharged controlled substance offenses testified to by the witnesses were not in a series and related. Accordingly, the *Richardson* error was harmless beyond a reasonable doubt.

The Motion to Amend to Add an *Apprendi* Claim

As Defendant explains in his motion, unlike many other cases in this district, in this case the indictment charged the drug quantities. In counts II and III the indictment charged conspiracies to import into the United States and to possess with

intent to distribute 1000 kilograms or more of marijuana and 5 kilograms or more of cocaine. Doc. 696, p.1 (setting forth the allegations of the indictment).

Following this circuit's precedent at the time, the jury was not required to find drug quantities as elements of the offense. On May 13, 1992, the court charged the jury that while the indictment "makes reference to specific quantities of controlled substances, quantity is not an element of the offense charged. The amount or quantity of a controlled substance is only relevant to the sentencing in the event of a conviction." Doc. 696, p.2. Defendant was sentenced to life imprisonment after convictions on both counts.

Defendant seeks to amend his §2255 motion to add a claim arising under *Apprendi v. New Jersey*, 530 U.S. __, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Defendant's claim is that because the jury was not charged that they must find the drug quantities beyond a reasonable doubt, he may be sentenced to no more than 20 years of imprisonment on counts II and III.[7] Doc. 696, p.6. ¶7.

In *Apprendi*, the Court "confirm[ed] the opinion that we expressed in [*Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed. 311 (1999)]. Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362-2363

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[7] Defendant does not allege that the indictment failed to charge an element of the offense, and cannot so claim, as the indictment here alleged the threshold drug quantities for a life sentence. Thus, the supplemental authority, *United States v. Tran*, Nos. 99-1278(L) and 99-1389, ___F.3d ___, 2000 WL 1701651 (2d Cir., Nov. 15, 2000), is inapposite.

(emphasis added).

There may be substantial problems with the timeliness of this new claim under the one year limitation of 28 U.S.C. §2255. The Supreme Court may eventually apply the *Apprendi* jury instruction claim retroactively to cases on collateral review, and when it does, Defendant will be permitted to bring the claim.[8] Rather than resolve theses questions now, however, it is easier and more efficient for the court to determine the motion by the application of procedural default rules.

Defendant did not raise this claim at trial or on direct appeal, and the claim is procedurally defaulted. The court therefore looks instead to whether Defendant can demonstrate cause and prejudice to excuse his procedural default, or whether he has shown actual innocence. *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 1610-12, 140 L.Ed.2d 828 (1998). The cause and prejudice test applies even though *Apprendi* was decided after Defendant's conviction became final. *See, Pitts v. Cook*, 923 F.2d 1568, 1571, n.5 (11th Cir. 1991)(rejecting the argument that claim there was so novel that the failure to raise it could not constitute procedural default). Instead, legal novelty can constitute cause only if "the legal basis for the claim was not reasonably available to petitioner's counsel." Id., at 571, *citing Reed v. Ross*, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910, 82 L.Ed.2d 1 (1984); *Bousley*, 523 U.S. at 622, 118 S.Ct. at 1611 (also citing *Reed*).

It cannot be said that the claim which was successful in

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Apprendi speaks to the elements of the offense. Accordingly, decisions which discuss *Teague* but fail to mention *Bousley*, including the cases cited by both parties in the notices of supplemental authority, do not appear to be reliable. If this is error, however, it is harmless because relief should not be granted for other reasons.

Apprendi was not reasonably available before then, such that counsel for Defendant "lacked the tools" to construct it. 923 F.2d at 1572 (citation omitted). This is so because, as previously noted, in *Apprendi* the Court confirmed what it had expressed in *Jones*, 120 S.Ct. at 2362-2363. *Jones* had set forth the constitutional principle in dicta, to support the Court's interpretation of a statute that certain provisions were elements rather than sentencing factors, because otherwise "the statute would be open to constitutional doubt *in light of a series of cases over the past quarter century*, dealing with due process and the guarantee of trial by jury." 526 U.S. at240, 119 S.Ct. at 1222 (emphasis added). The discussion of those cases in *Jones* reveals that the tools for *making* the claim ultimately successful in *Apprendi* were available well before Defendant's conviction in this case. That the claim had been rejected in this circuit both before and after *Jones*[9] (as well as almost all of the others) does not constitute cause for default. *Bousley*, 523 U.S. at 623, 118 S.Ct. 1611 (" futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'")(citation omitted).

Ineffective assistance of counsel may constitute cause for a procedural default, of course. But the fact that a claim is newly clarified or articulated by the Supreme Court, yet not so novel that novelty itself is cause for the default, does not mean that counsel was unreasonable for failing to raise it. *Pitts*, 923 F.2d at 1571-1573. "[T]here will often be a 'gap' between the spheres

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[9] *See, United States v. Hester*, 199 F.3d 1287, 1290-92 (11th Cir. 2000), *vacated and remanded in light of Apprendi*, 121 S.Ct. 336 (Oct. 16, 2000) and *overruled* (due to *Apprendi*) in *United States v. Rogers*, 228 F.3d 1318 (11th Cir. 2000). In *Hester* the court noted that before *Jones* it had "clearly rejected the characterization of the amount of drugs as an element of the offense under §841," and found that *Jones* did not require a contrary result. *Id.* (citations omitted).

of novelty and ineffective assistance of counsel," *id.* at 1573-1574 (citations omitted), and counsel's failure to raise an *Apprendi* claim prior to *Apprendi* and *Jones* is not ineffective assistance of counsel in the constitutional sense. This is especially true where the claim was not supported by circuit precedent. *Cf.*, *Williamson v. Moore*, 221 F.3d 1177, 1180 (11th Cir. 2000)(finding that a reasonable attorney would not have pursued a self defense theory for a number of reasons, one of which was that "in trial counsel's experience, self-defense arguments did not have a high rate of success in that jurisdiction.").

In summary, it was not attorney error for Defendant's trial lawyer to fail to make the *Apprendi* claim. Further, there was no impediment to the making of the claim. For these reasons, cause for default has not been shown.

Thus, the only way Defendant can successfully bring an *Apprendi* claim now is by showing that he is actually innocent with respect to the life sentences. Defendant has not attempted to make such a showing. The court is familiar with the trial evidence, and it is plain that there was a significant amount of evidence that Defendant's involvement with the two conspiracies was an involvement with more than 1,000 kilograms of marijuana and more than 5 kilograms of cocaine.

Thus, amendment to bring an *Apprendi* claim would be futile. Amendment need not be allowed where it would be futile to add new claims.

> Among the reasons that the Supreme Court has recognized as warranting the denial of a motion to amend is "futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). "A proposed amendment is futile if the complaint, as amended, would be

subject to dismissal." *Jefferson County School Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 859 (10th Cir. 1999).

Galindo v. ARI Mut. Ins. Co., 203 F.3d 771, 777 n.10 (11th Cir. 2000). Since amendment would be futile, the court should exercise it discretion and deny the motion to amend.

For these reasons, it is **RECOMMENDED** that the court **DENY** the third motion to amend the §2255 motion, doc. 696, and **DENY WITH PREJUDICE** Defendant's final §2255 claim, the *Richardson* claim.

IN CHAMBERS at Tallahassee, Florida, this 28th day of December, 2000.

WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

A party may file specific, written objections to the proposed findings and recommendations within 30 days after being served with a copy of this report and recommendation, and the normal time for objections is extended accordingly. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

UNITED STATES OF AMERICA,

vs. **CASE NO. 1:89cr01007 MMP**
1:97 cv8 MMP

ALAN ROSS,

Defendant

_____/

ORDER

This case comes before the Court for consideration of the Magistrate Judge's Report and Recommendation (Doc. 705) dated December 28, 2000. The parties have been furnished a copy of the Report and Recommendation (Doc. 705) and have been afforded an opportunity to file objections. Pursuant to Title 28, United States Code, Section 636(b)(1), the Court has made a de novo determination of any portions to which objections have been made.

Having considered the report and recommendation and all objections timely filed, the Court determines that the report and recommendation should be adopted. The government filed a Response to the Second Report and Recommendation (Doc. 706) in which the government provides the following: (1) that a claim brought pursuant to *Richardson v. United States*, 526 U.S.

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813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999) does not apply in this case because the Supreme Court and the Eleventh Circuit Court of Appeals have not recognized the retroactive application of *Richardson* pursuant to 28 U.S.C. §2255(3); (2) that the Sixth Circuit has ruled that *Richardson* does have retroactive application pursuant to 28 U.S.C. §2255(3), *see Murr v. United States*, 200 F.3d 895 (6th Cir. 2000); that the Sixth Circuit decided *Murr* incorrectly; and (4) that defendant's *Richardson* claim should be deemed "untimely" and "premature."

The Court acknowledges that the Eleventh Circuit has not yet issued an opinion explicitly stating that *Richardson* is retroactively applicable to cases on collateral review. However, such an explicit statement is not required because the Supreme Court in *Richardson* interpreted and clarified the meaning of a substantive criminal statute enacted by Congress. When the Supreme Court issues a new constitutional rule of criminal procedure, then an explicit statement of whether the new rule applies retroactively on collateral review is required, pursuant to 28 U.S.C. §2255(3).

The Sixth and Seventh Circuits have held that *Richardson* involves the substantive construction of a criminal statute, 21 U.S.C. §848(c), and that pursuant to *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 1610, 140 L.Ed. 828 (1998), *Richardson* applies retroactively. *See Murr v. United States*, 200 F.3d 895, 905-906 (6th Cir. 2000); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000). In contrast, a new constitutional rule of criminal procedure is barred on collateral review. *See Teague v. Lane*, 489 U.S. 288, 305-09, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Nothing has been presented to the Court to demonstrate that the *Richardson* decision constitutes a new constitutional rule of criminal procedure instead of a substantive interpretation of an existing statutory provision. *Teague* is inapplicable when the Supreme Court decides the meaning of a criminal statute enacted by Congress as

occurred in *Richardson*. *See Bousley*, 523 U.S. at 615.

Regarding the choice of terms, the Court notes that the *Richardson* claim in this case is not "premature" because *Richardson* interprets a substantive criminal statute and, therefore, is applied retroactively. Additionally, the *Richardson* claim is not "untimely." *Richardson* was decided on June 1, 1999. *See Richardson* 526 U.S. at 823, 119 S.Ct. at 1707. Defendant filed his motion to amend his §2255 motion (Doc. 680) on September 20, 1999, well within the one-year statute of limitations provided by §2255(3).

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. The Magistrate Judge's Report and Recommendation (Doc. 705) is **ADOPTED** and incorporated by reference in this order.

2. Defendant's third motion to amend §2255 motion (Doc. 696) is **DENIED**.

3. Defendant's final §2255 claim, the *Richardson* claim, is **DENIED WITH PREJUDICE**.

DONE AND ORDERED this 26th day of January, 2001.

MAURICE M. PAUL, SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

UNITED STATES OF AMERICA,

vs. **CASE NO. 1:89cr01007 MMP**
1:97 cv8 MMP

ALAN ROSS,

Defendant

_____/

ORDER

Before the Court is Defendant's Motion to vacate the Order of January 26, 2001, or Alternatively, to Reconsider Order Based on Defendant's Objections (Doc. 710). The Court notes that it prematurely adopted the Magistrate Judge's Report and Recommendation. Pursuant to 28 U.S.C. §636(b)(1), the Court will conduct a de novo review based upon the Defendant's Objections (Doc. 709).

Defendant raises the following two claims in his Objections (Doc. 709): (1) that the Magistrate Judge improperly applied harmless error analysis to Defendant's *Richardson* claim; and (2) that Defendant should be permitted to amend his §2255 motion to include an *Apprendi* claim. Addressing the second issue, Defendant has no *Apprendi* claim because the Supreme Court has not held that *Apprendi* applies retroactively on collateral review. *See In Re Joshua*, 224 F.3d 1281, 1283 (11th

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Cir. 2000). The Supreme Court has only allowed *Apprendi* claims on direct appeal. *See id.*

At trial, the Court failed to instruct the jury that its verdict had to be unanimous as to three violations for Count I, a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. §848. *See Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). An element of a §848 offense is a continuing series of at least three violations. *See United States v. Alvarez-Moreno*, 874 F.2d 1402, 1408 (11th Cir. 1989), *cert. denied*, 494 U.S. 1032 (1990). A controlled substance conspiracy conviction qualifies as a §848 predicate violation. *See United States v. Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987). Additionally, an overt act that violates the drug laws, but that is not charged in a separate count, also qualifies as one of the predicate violations for a §848 charge. *See id.* Defendant was convicted of Count II, conspiracy to import controlled substances, and Defendant was convicted of Count III, conspiracy to possess with intent to distribute controlled substances. Therefore, defendant was convicted of two offenses that qualify as predicate violations for Count I.

Thus, the only remaining issue to be resolved is whether the Government has shown beyond a reasonable doubt that the jury would have unanimously found at least one other continuing violation from the evidence presented, which included nine witnesses that testified regarding three or more controlled substance offenses committed by Defendant, and hundreds of such offenses that were placed in evidence. The Magistrate Judge properly applied the harmless error analysis as provided by the Eleventh Circuit in *United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999). In *Neder*, the Eleventh Circuit provides that the correct harmless error analysis is whether the jury verdict would have been the same absent the error or whether the record contains evidence that could rationally lead to a contrary finding. *See id.* As stated above, ample evidence was introduced to

demonstrate that Defendant committed the uncharged controlled substance offenses. The record in this case did not contain "evidence that could rationally lead to a contrary finding" by the jury with respect to the last predicate offense to sustain a conviction for Count I. *See id.* This was not a case in which the jury simply concluded "that where there is smoke there must be fire." *See Richardson*, 526 U.S. at 819. Additionally, it defies logic that a rational jury could find Defendant unanimously guilty of the conspiracies charged in Counts I and II without a unanimous finding that Defendant committed at least one of the hundreds of controlled substance offenses in evidence. Further, defendant did not contest that the uncharged controlled substance offenses testified to by the witnesses were not in a series and related. Thus, the *Richardson* error was harmless beyond a reasonable doubt.

Defendant asserts that the harmless error analysis in *United States v. Brown*, 202 F.3d 691 (4th Cir. 2000) should apply. Even following the harmless error analysis set forth in *Brown*, defendant fails to genuinely contest the evidence. The defendant in *Brown* was able to impeach five key witnesses through the witnesses' contradictory testimony, alleged lack of memory regarding critical events, and prior inconsistent statements. *See id.* at 702. The defendant in *Brown* was able to genuinely contest the evidence supporting each of the alleged predicate offenses. *See id.* In the case at hand, Defendant did challenge the credibility of ten witnesses. *See* Defendant's Response to Government's Supplemental Brief (Doc. 702), at 8-17. However, defendant's challenge was only a *general attack* on the witnesses' credibility that showed the witnesses may have had a general propensity to lie because of prior criminal convictions and prior untruthful statements. Defendant, unlike in *Brown*, was not able to actually impeach the witnesses. Instead, the jury found these witnesses credible, which led to Defendant's conviction on Counts II and III, the conspiracy charges. To reiterate, nine witnesses testified as to three or more controlled

substance offenses committed by Defendant, and hundreds of such offenses were placed in evidence. This was a trial with overwhelming evidence, and the closing arguments indicate that both sides viewed the verdict as an all or nothing issue. Either the jury would perceive cooperating witnesses as liars and acquit Defendant, or the jury would accept the cooperating witnesses' testimony and convict Defendant. The latter occurred. If properly charged, the jury, in light of the overwhelming evidence, would not have reached a different conclusion.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Defendant's Motion to Vacate or, Alternatively, Motion for Reconsideration (Doc. 710) is **DENIED**.

2. The Court's Order of January 26, 2001 (Doc. 707)(adopting the Magistrate Judge's Report and Recommendation) is **INCORPORATED** by reference in this Order.

DONE AND ORDERED this 23rd day of February, 2001.

MAURICE M. PAUL,
SENIOR DISTRICT JUDGE